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Testamentary Revival

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NOTES

TESTAMENTARY REVIVAL

Whether a will may be revived without the execution of a codicil or another will after it has been revoked (a) by a subsequent inconsistent will or (b) by a subsequent will containing a revocatory clause, has been an interesting problem in this country. The present discussion deals with the problem of revival where there is no subsequent codicil, and the only reason for inferring a revival arises from the fact that the formerly revoked will still exists.[1]

Three positions have prevailed in England and they are not difficult to state. Under the lead of Lord Mansfield[2] the rule was thoroughly established that the revocation of a later revoking will automatically revived the former will if it was still in existence. The logic of this position is almost unassailable when one considers the provisions of the Statute of Frauds regarding revocation. This position however, led to many hardships because the restoration of a will to efficacy, which had been thought to be entirely out of the way, and had ceased to express the testamentary desires of the testator, was not affected by the question whether or not the testator intended a revival.

The earlier view of the Ecclesiastical Courts seems to have been that presumably the will is revoked.[3] Later, effect was sought to be given to the intent and there was no presumption either way.[4] In this event the burden of proof would naturally be upon the one asserting that the former will was intended to

[1] The present writer has endeavored to show in an article in 40 Harvard Law Review 71 (1926), entitled "Testamentary Republication," that "Republication" properly speaking, applies to the execution of a codicil which brings down to the date of the codicil the language of a prior will, whereas "Revival" by codicil gives new life to an old but no longer operative will, though at one time it must have been operative. Republication and revival both differ from "Incorporation by Reference" in which the incorporating instrument gives testamentary life for the first time to the writing incorporated. In that article revival by subsequent writing was examined and so is not considered here.

It should be noted that the term "Revival" is to some degree a misnomer in that it implies that a will is revoked immediately upon the execution of a second revoking will. Whether this is true or not is the question. Perhaps the term "restoration" would be preferable.

[2] *Goodright D. Glazier* v. *Glazier* (1770), 4 Burr. 2512; *Harwood* v. *Goodright* (1774), 1 Cowp. 87

[3] *Helyar* v. *Helyar* (1754), 1 Lee Ecc. 116.

[4] *Wilson* v. *Wilson* (1821), 3 Phill. Ecc. 543; *Usticke* v. *Bawden* (1824), 2 Add. Ecc. 116.

be revived. This view seems to be open to grave objections in that the question whether a given instrument is revived becomes dependent upon various bits of evidence, the force of which may impress different judges variously, and there would be little to guide one in predicting how courts would hold in given circumstances.[5] It also tends to reintroduce difficulties which the Statute of Frauds sought to avoid. In *Pickens* v. *Davis*[6] the court was inclined to believe that oral evidence as to declaration of the testator would be admissible. The court also raised the question as to whether, when a testator had abandoned the dispositions in a prior will, by executing a later one, and then revokes a later one, he returns to the prior scheme. It is conceived that the really pertinent question is, has the prior will ever been finally and effectually revoked. This, of course, throws us back upon the common law position.[7]

In America not a few jurisdictions follow the ecclesiastical position despite its difficulties. An extraordinary view was once adopted in Connecticut,[8] the suggestion probably coming from Mr. Powell in England. It is something like a commingling of the common law and the ecclesiastical views, to the effect that if a will is revoked by a later will which is merely inconsistent with it, it is revived on the revocation of the later will. If, however, the prior will is revoked by a later will containing an express revocatory clause, the revocation of such later will does not restore the prior will. To distinguish between cases where the later will is merely inconsistent with the former one, and cases where the later will contains an express revocatory clause, is to hold that this clause becomes operative at once though the remainder of the instrument becomes operative only at death. An effort to explain this anomaly is occasionally made by the suggestion that where a statute permits of revocation either by *subsequent will or by subsequent writing* (properly executed) this clause may be regarded as that *subsequent writing*.[9] This rea-

[5] See note in 7 Minn. Law Rev. (1922-1923) 158, dealing with the elements considered in determining the testator's intention.

[6] (1883) 134 Mass. 252.

[7] See Rood on Wills (Second Edition 1926) Sec. 361, note 65, for a list of states which purport to follow the ecclesiastical view.

[8] *James* v. *Marvin* (1819), 3 Conn. 576.

[9] See *Stetson* v. *Stetson* (1903), 200 Ill. 601. This view seems to be approved in a comment in 32 Yale Law Journal 70. The distinction seems also approved in 7 Minn. L. Rev. (1922-3), 158, 162.

soning seems to be far-fetched. An instrument may at various stages of its execution be denominated a will. It is a will in every sense on the death of the testator if it has been properly executed but it is also usually referred to as a will after it is signed and subscribed even though it may later be replaced. It may also be referred to as a will after it is signed and before it is subscribed, and it is often called a will even before it is signed. It may be important to know in what sense the term is used by the legislature. But when the legislature declared that a will may be revoked by a later will or other writing, it is almost certain to a demonstration that it did not intend that the "other writing" should be found in and be a part of a later will. It did not intend to distinguish between the various parts of a will and denominate part of it "another writing," since the juxtaposition of the words used precludes that interpretation. In Connecticut when this view was first enunciated the statute did not so provide.[10] In *Whitehall* v. *Halbing*[11] this view was finally repudiated at its adopted home. Both in Connecticut and in Florida recently the common law rule has probably been applied. One cannot, however, always determine the true position of the court when it is not required to choose between ecclesiastical and the common law views.[12] In Minnesota also the ecclesiastical or common law rule has recently been adopted but it is not clear which one.[13]

Some jurisdictions have adopted a statute substantially like the Wills Act.[14] Under such a statute there can be no revival without a re-execution or a republication of the will. Several states have enacted a statute similar to that in New York which reads as follows:

"If after the making of any will the testator shall make and execute a second will, the destruction, canceling, or revocation of such second will shall not revive the first will, *unless it appear by the terms of such revocation* that it was the intention to revive and give effect to his first will or unless . . ."[15]

[10] See 32 Yale Law Jour. (1922) 70.

[11] (1922) 98 Conn. 21, 118 Atl. 454.

[12] *Schaefer* v. *Voyle* (1924), 88 Fla. 170, 102 So. 7.

[13] *In re Tibbetts' Estate* (1922), 153 Minn. 53, 189 N. W. 401; Commented upon in 7 Minnesota Law Review, supra, note 5.

[14] See Carroll's Kentucky Statutes (6th Ed. 1922), Sec. 4834.

[15] See Rood on Wills, Sec. 361, Note 70, for states which have statutes like the Wills Act. He also gives a list in Note 72 of the states which have statutes similar to the New York statute. In 8 Cornell Law Quart. (1923) 183, it is indicated that some states reach the re-

While the language is not entirely free from ambiguity, we are doubtless to understand that if the revocation were by destruction merely, it would not be possible to comply with the terms of the revocation and show that it was intended that the prior will should be revived. It has been held in New York that this revocation by later will must be in writing which is executed as a will is required to be executed. Therefore this type of statute is not far different from the Wills Act in its general effect.

It is not probable that there will be judicial peace with reference to the subject of "revival" until after a thorough study of the problems both in England and here, comprehensive legislation is enacted to define the policy for each jurisdiction.[16] The Kentucky Statute is to be commended.

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sult of the English statute without an act of the legislature but the states are not named nor are cases cited. Other comments on various phases of the matter may be found in 21 Mich. L. Rev. 142 (1903); 9 Harvard Law Rev. 364 (1899); 13 Harv. Law Rev. 142 (1903). See also (1900) 39 American Law Register N. S. 505.

[16] It is thought that a table showing the positions which have been taken may be useful:

I. *Revival in the English Courts*:
   1. The Common Law Rule: The destruction of the revoking instrument revives automatically the former, still existing will.
   2. The Ecclesiastical Rule: No presumption either way, the question of revival of the former will after the revocation of the revoking will, is a matter of the intention of the testator.
   3. The Statutory Rule: The Wills Act required a will once revoked, to be re-executed or republished in order to be revived.

II. *Revival in the American Jurisdictions*:
   1. The ecclesiastical rule prevails in several jurisdictions where the revoking will is merely inconsistent. Cf. 1 Page on Wills (2nd Ed. 1926), Sec. 442-448.
   2. The common law rule obtains in several jurisdictions but in several jurisdictions if (1) there is a statute authorizing revocations by *other duly executed will or other writing*, and (2) the later will contains an express revocatory clause, the prior will is not revived save by republication or re-execution.
   3. The Statutory Rules:
      i. In a few jurisdictions there is a statute similar to the Wills Act dealing with the subject of revival. Cf. Carroll's Kentucky Statutes (6th Ed. 1922), Sec. 4834.
      ii. In several states there is a statute requiring for revival that the revocation of the later will show expressly that a revival of the prior will is intended, or else re-execution or republication only can revive the revoked will.